

BEFORE THE  
SURFACE TRANSPORTATION BOARD

ORIGINAL

209929

Finance Docket No. 34054

Morristown & Erie Railway, Inc.  
Modified Certificate



PETITION OF FIVE NEW JERSEY MUNICIPALITIES  
TO REOPEN

REPLY OF UNION COUNTY, NEW JERSEY

ENTERED  
Office of Proceedings

JAN 22 2004

Part of  
Public Record

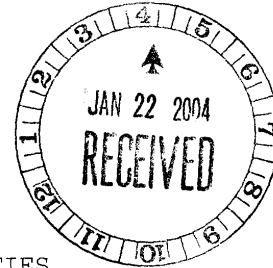
John D. Heffner, Esq.  
John D. Heffner, PLLC  
1920 N Street, NW - Suite 800  
Washington, DC 20036

Due: January 22, 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34054

Morristown & Erie Railway, Inc.  
Modified Certificate



PETITION OF FIVE NEW JERSEY MUNICIPALITIES  
TO REOPEN

REPLY OF UNION COUNTY, NEW JERSEY

I.  
INTRODUCTION

On January 2, 2004, Five New Jersey Municipalities (hereafter "Petitioners" or "the Five Municipalities")<sup>1</sup> filed a Petition to Reopen a Board decision served 18 months ago on July 5, 2002, in order to impose certain environmental and "community impact" conditions and mitigation measures. That decision granted the Morristown & Erie Railway, Inc. ("M&E"), an existing class III short line railroad, a Modified Certificate of Public Convenience and Necessity to operate a series of light density rail lines formerly owned and operated by the Staten Island Railway ("SIRY") and the Rahway Valley Railroad ("RVRV").<sup>2</sup> The lines were abandoned in 1991 and 1992 and subsequently acquired

---

<sup>1</sup> The City of Summit, the Township of Springfield, the Borough of Kenilworth, the Borough of Roselle Park, and the Borough of Roselle

<sup>2</sup> The subject lines extend from a point west of the New Jersey Turnpike in Linden, NJ, to the junction of the former Staten Island Railway line with N.J. Transit's Raritan Valley Line in Cranford, NJ and from the Raritan Valley Line in Cranford to a junction with N.J. Transit's Morris and Essex Line in Summit, NJ.

by the New Jersey Department of Transportation for continued rail service. Union County, a political subdivision of the State of New Jersey served by the subject lines, joins M&E in urging the Board to reject the Five Municipalities' Petition as a mere last minute attempt to delay the restoration of rail service long sought by it and the State of New Jersey.

II.

BACKGROUND AND  
STATEMENT OF INTEREST

Union County believes the following background information will assist the Board in its understanding of this unusual proceeding. In 1994 NJDOT purchased the subject rail lines pursuant to the State of New Jersey Bridge Rehabilitation & Improvement and Railroad Right-of-Way Preservation Bond Act of 1989. Thereafter, NJDOT and Union County entered into an agreement on June 23, 2000, whereby NJDOT granted Union County a right of entry "for the purposes of rehabilitating the railroad, track, structures, and right-of-way for the subsequent re-establishment of rail service on the property."<sup>3</sup> To accomplish these goals, the State of New Jersey authorized and appropriated \$7.8 million in state funding. Union County eventually selected M&E as its class III short line railroad operator. On May 9, 2002, Union County and the M&E signed an Operating Agreement and

---

<sup>3</sup> A copy of NJSA 27:1B-3 defining "transportation project" and evidencing the State's intention that the subject rights of way be used for rail service and not for recreational purposes is attached as Exhibit A.

on June 5, 2002, the M&E filed an application for a Modified Certificate of Public Convenience and Necessity. As relevant, the Operating Agreement provides<sup>4</sup> that M&E will restore service in four phases, with the first two segments to be restored to service within 6 months from the date of execution of the Agreement. In June 2002 M&E began initial track and right-of-way rehabilitation work preliminary to the commencement of common carrier rail service on the first of the these segments. Thereafter, on July 5, 2002, the STB served the decision belatedly challenged here, granting M&E's application.

Subsequent to the commencement of M&E's rehabilitation program in June 2002, County Manager George Devanney wrote Borough of Kenilworth Mayor Tripodi on August 5, 2002, to assure him that rail service restoration was not imminent and that M&E would not commence service until authorized by the County and only when municipal issues and concerns have been addressed and approved by his governing body. Thereafter, on August 22, 2002, the Union County Board of Chosen Freeholders adopted Resolution No. 902-02<sup>5</sup> stating that the County of Union shall not approve the usage of the rail line right of way unless and until the affected municipalities each pass a governing body resolution consenting to such usage." This resolution in turn led to other

---

<sup>4</sup> Pages 5-7 attached hereto as Exhibit B.

<sup>5</sup> Copy attached as Exhibit C.

correspondence between Mr. Devanney and Union County Freeholder Nicholas Scutari and officials of the Five Municipalities expressing their respective interpretations of the Operating Agreement (that the municipalities' consent was required before the initiation of rail service). In fact, as the Affidavit of Union County, Director of Economic Development James Daley attached hereto as Exhibit D indicates these interpretations of the Operating Agreement were erroneous and later corrected in Resolution No. 633-20 adopted on June 5, 2003, at an open meeting of the Union County Board of Chosen Freeholders held at 7PM with ample and vigorous participation by all members of the public including representatives of the Five Municipalities.

Still convinced of the righteousness of their position, each of the Five Municipalities initiated litigation in June and July 2003 in New Jersey Superior Court to invalidate the Operating Agreement and halt the restoration of rail service.<sup>6</sup> On December 5, 2003, Superior Court Judge Edward Beglin denied the relief sought by the Five Municipalities against M&E and most of the

---

<sup>6</sup> One illustrative case was docketed as UNN-L-2302-03, The Borough of Kenilworth, et al v. The County of Union and the Morristown and Erie Railway, Inc. The suit alleged that Plaintiffs relied on a promise not to restore rail service without the Five Municipalities' consent and that Defendants broke that promise, that the Plaintiffs are third party beneficiaries under the Operating Agreement, that Union County failed to meet the minimum requirements for a State Rail Plan, that Union County failed to prepare an Environmental Impact Statement as well as a traffic and safety plan and put at risk Plaintiffs' citizens and businesses, and that one or more Freeholders have undisclosed conflicts of interest. Plaintiffs asked the Court to enjoin implementation of the Operating Agreement and to require discovery.

relief sought against Union County in a bench ruling. His subsequent written order disposing of the matter is attached here as Exhibit E. A transcript of the proceedings is presently unavailable due to the extended illness of the court reporter but will be submitted to the Board as soon as it becomes available. This Petition for Reopen followed shortly thereafter.

The gist of Petitioners' argument, as best Union County can decipher, is that after certain County officials had promised that the affected local communities would have a veto over the reconstruction of the subject rail lines and resurrection of rail service over it, Union County reneged on this alleged offer. The specific "changed circumstance" which Petitioners allege warrants a reopening is a Resolution (No. 633-20 dated June 5, 2003) by the Union County Road of Chosen Freeholders authorizing the County and the M&E to implement Phases 2, 3, and 4 of the Operating Agreement.

### III. SUMMARY OF ARGUMENT

Petitioners' attempt to have the Board reopen this long ago granted Modified Certificate of Public Convenience and Necessity on the basis of an alleged "changed circumstances" is without merit and should be rejected outright. First, by initiating this proceeding some seven months after the action alleged to represent the "changed circumstance" and over 18 months after the issuance of the challenged decision, the Five Municipalities are

guilty of laches for sitting on their rights. While Petitioners waited, Union County and M&E took actions and spent substantial sums of money and would now be prejudiced by a grant of Petitioners' request for relief. Second, even assuming their request was timely, the Board still has no jurisdiction to give the request relief. It amounts to nothing more than an attempt to bring to the Board a breach of promise claim that Petitioners unsuccessfully sought to litigate in the New Jersey Courts. The Board does not have jurisdiction over contract claims between parties. Third, aside from these considerations, the Board is powerless to grant the requested environmental relief because the level of traffic proposed for the line is below the Board's threshold for action under its environmental regulations and the track rehabilitation work does not constitute "new construction" under applicable precedent. Fourth, to the extent that the prior owners of the railroad had not satisfied the conditions imposed by the ICC or the State of New Jersey for restoring the right of way to a satisfactory condition, the Board lacks the power to require to require either Union County or the M&E to fulfill those responsibilities. Finally, Union County asks the Board to require the Five Municipalities to abide by the terms of the Operating Agreement regarding community outreach efforts.

IV.  
ARGUMENT

The Board's Rules of Practice provide that a party may "file a petition to reopen an administratively final decision of the Board pursuant to the requirements of 49 CFR 1115.3(c) and (d)... stating in detail the respects in which this proceeding involves material error, new evidence, or substantially changed circumstances and must include a request that the Board make such a determination." 49 CFR 1115.4. Petitioners base their reopening request on an allegation of "changed circumstances," a claim that Union County changed a position adopted subsequent to the July 5, 2002, modified certificate decision. More specifically, they contend that Union County is proceeding with the reconstruction of the subject rail lines despite prior assurances to the Five Municipalities that such reconstruction and operation would not occur without the Municipalities' consent. Because, they assert, the Municipalities concerns over serious environmental and safety issues have not been addressed, reopening is said to be necessary for a thorough environmental review and consideration, at a minimum, of necessary environmental and safety mitigation measures. For the following reasons, Union County believes Petitioners' claims lack merit and urges the Board to reject it.



1. LACHES

First, the Petition to Reopen is barred by laches and is, in reality, an attempt to relitigate in another forum [the STB] a civil proceeding initiated by the Five Municipalities in the New Jersey courts.

While the Board recognizes that specific time limits are not applicable to the filing of petitions to reopen, it has stated that the time elapsed is relevant and depending upon the facts of the case, concerns for administrative finality, repose, and detrimental reliance must be balanced with those factors that support reopening. See, FD No. 31974, Mountain Laurel Railroad Company-Acquisition and Operation Exemption-Consolidated Rail Corporation (slip op. served May 15, 1998 at 9). And in FD No. 32549 (Sub-No. 24), The Burlington Northern And Santa Fe Railroad Company-Petition for Review of Arbitration Award (served September 25, 2002), the Board found that it could apply the doctrine of laches to protect the integrity of the arbitral process.

Here NJDOT, M&E and Union County have spent substantial effort and sums of money in their effort to restore the subject rail lines to service. The Operating Agreement contains a community outreach procedure for affected parties to present their concerns about resurrection of service to M&E and the County but the Petitioners never availed themselves of that

process. Instead, they waited 18 months after the issuance of the original decision in this case, seven months after the adoption of Resolution No. 633-20, and one month after Judge Beglin's unfavorable ruling to seek sympathy from the Board.

2. THE BOARD LACKS JURISDICTION OVER PETITIONERS' CLAIMS

While the Five Municipalities have cleverly styled their request for relief as a Petition to Reopen for the purpose of requiring the Board to comply with the environmental permitting requirements of the National Environmental Policy Act, they are nothing more than an attempt to bring an alleged breach of promise before the Board. As counsel for Petitioners is well aware, the STB and its predecessor agency, the Interstate Commerce Commission, have long held that contract disputes and contract interpretation questions are matters for courts or arbitration panels to decide. Burlington Northern, Inc., Trackage Rights, 347 I.C.C. 210, 213 (1974). Union County believes the reason why the Five Municipalities waited until now to challenge resurrection of rail service is the fact that Judge Beglin denied their relief. Rather than meet with Union County and the M&E in an effort to discuss their concerns as provided in the "community outreach" provisions of the Operating Agreement, the Five Municipalities merely restyled opposition so as to fit the STB's regulatory process.

3. ASSUMING JURISDICTION EXISTS, THE BOARD LACKS THE POWER TO GRANT THE REQUESTED ENVIRONMENTAL RELIEF

Assuming, *arguendo*, that the Five Municipalities' Petition was timely and raises an issue within the Board's regulatory jurisdiction, the STB is powerless to grant the requested relief. Essentially Petitioners want the Board to find that the rail activity on the subject rail line (thrice weekly service operating at speeds of less than 25 mph and handling up to 15 carloads per trip for the first two years of the contract)<sup>7</sup> is so substantial as to trigger the Board's environmental regulations therefore requiring analysis and appropriate relief.

Generally, a present or future rail common carrier seeking to restore service over an abandoned line of railroad acquired by a public agency has two options for seeking STB entry authority. It may seek a class exemption under the procedures of 49 CFR 1150.31 (hereafter "the class exemption procedures") or it may file an application for a Modified Certificate of Public Convenience and Necessity under 49 CFR 1150.21 (hereafter "the modified certificate procedures"). The Board's environmental reporting regulations at 49 CFR 1105.6 require preparation of an Environmental Assessment for an acquisition, lease, or operation under 49 U.S.C. 10901 if it will result in either (1) operational changes that would exceed any of the thresholds established in

---

<sup>7</sup> See, the affidavit of M&E President Gordon Fuller submitted with the Reply of M&E. After the initial two years, the understanding with M&E permits it to increase service frequency to one roundtrip five days per week.

sec. 1105.7(e) or (2) or an action that would normally require environmental documentation such as a construction or abandonment and do not [emphasis supplied] require documentation for an acquisition, lease, or operation transaction that does not meet those thresholds. While short line railroad class exemption applicants routinely represent in their notices of exemption that their proposed transaction does not meet the agency's environmental reporting thresholds, the modified certificate procedures do not require applicants to submit information and such applications do not routinely address those impacts.

Here Union County wanted M&E to use the modified certificate procedures to submit its operating authority request to the Board in lieu of the class exemption procedures of 49 CFR 1150.31 and M&E duly complied. M&E did not address whether its proposed traffic levels would meet the STB's environmental reporting threshold for the simple reason the regulations did not require it to do so. But even if M&E had complied with 49 CFR 1105.6, the amount of traffic the line would handle falls far short of the STB's threshold<sup>8</sup> for imposing any sort of environmental relief such as that requested by Petitioners. In FD No. 33508, Missouri Central Railroad Company-Acquisition And Operation

---

<sup>8</sup> An increase in rail traffic or rail yard activity of at least 100 percent or a frequency of at least eight trains per day or, in the case of a nonattainment area, an increase in rail traffic of at least 50 percent (20 percent in rail yard activity) or a frequency of at least three trains per day. Union County is in a nonattainment air quality area.

Exemption-Lines of Union Pacific Railroad Company, et al

(decision served April 30, 1998, decision on reconsideration served September 14, 1999) the Board rejected positions from communities along the rail line similar to those asserted here by the Five Municipalities. There Missouri Central had acquired a long out of service rail line for the purpose of reestablishing service with an initial frequency of one round trip daily and an eventual long term frequency of up to two daily trains. In denying the communities' petitions to reject and their argument that reconstructing the track was tantamount to new construction, the Board specifically held that the service level proposed was too insubstantial to warrant a grant of the environmental relief requested. Union County submits that the even lesser amount of service proposed here warrants the same result. And the facts here would compel the same result even if M&E had sought operating authority under the class exemption procedures of 49 CFR 1150.31.

Moreover, the Five Municipalities conveniently overlook the benign environmental impacts caused by resumption of rail service. The Board's environmental regulations look with favor on transactions which divert freight from motor to rail transportation. 49 CFR 1105.7(e)(4) and (5). Surely, the municipalities will benefit by moving freight off congested, polluted highways to rail.

Alternatively, the Five Municipalities base their request for environmental relief on the assertion that the line's rehabilitation is so substantial as to be akin to new rail line construction, thereby mandating a thorough environmental review and appropriate relief. Petitioners' request should be rejected as totally contrary to STB precedent and practice. In Missouri Central, supra, the Board rejected the argument that a reconstruction of an out of service rail line is tantamount to new construction. April 30, 1998 decision at 6-7; cf. FD No. 33611, Union Pacific Railroad Company - Petition for Declaratory Order - Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX (slip op. served August 21, 1998, at 5-8).<sup>9</sup>

To the extent that M&E's operation of this line "penetrates" new territory, the railroad has sought operating authority from the Board by modified certificate. Having sought such authority, no additional authority is required for the rehabilitation of the deteriorated track, structures, and right of way.

4. THE BOARD LACKS JURISDICTION OVER M&E AND UNION COUNTY TO INSURE COMPLIANCE WITH THE ENVIRONMENTAL CONDITIONS IMPOSED IN THE PRIOR ABANDONMENT PROCEEDINGS

Finally, looking for any basis on which to attach its request for environmental relief, the Five Municipalities seize

---

<sup>9</sup> holding that the rehabilitation and restoration of an abandoned parallel rail line in order to double track a nearby active line does not constitute new construction subject to STB jurisdiction.

on the notion that the subject rights of way were polluted at the time they were abandoned and that the rehabilitation would disturb or dislodge hazardous substances. In connection with that argument, counsel for M&E contacted Delaware Otsego Corporation, owner of the former SIRY and RVRP, and was advised that those carriers had fully complied with the environmental conditions imposed by the ICC on those abandonments. Documents evidencing the acceptable environmental status of the former SIRY and RVRP rail lines are attached as Exhibits D and E to the Reply filed concurrently by M&E. Moreover, the purchase agreement between these railroads and the New Jersey DOT required completion of environmental compliance upon closing with the State. That closing occurred in 1994.

The STB has no power to require either M&E or Union County to fulfill the environmental obligations of either abandoning railroad in the unlikely event that SIRY or RVRP did not satisfy any abandonment-related environmental conditions. Both the SIRY and the RVRP rail lines were fully abandoned. Under federal law once a rail line is fully abandoned, the ICC and now the STB lose all jurisdiction over it. Hayfield Northern R. v. Chicago And N.W. Transp., 467 U.S. 620, 104 S. Ct. 2610 (1984). Accordingly, the Board has no power to impose conditions on the M&E for any actions which the abandoning railroads failed to undertake. Furthermore, the Board has no power to impose any conditions on

either the line's owner, NJDOT, or on Union County. Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 137 (1980) (holding that the ICC does not regard states which acquire abandoned rail lines as common carriers subject to its jurisdiction).

5. THE BOARD SHOULD REQUIRE THE FIVE MUNICIPALITIES TO ADDRESS THEIR CONCERNS DIRECTLY WITH M&E AND UNION COUNTY THROUGH THE COMMUNITY OUTREACH PROCEDURES OF THE OPERATING AGREEMENT

Under former STB Chairman Linda Morgan the STB wisely developed a policy of encouraging parties before the agency to use voluntary negotiations to the greatest extent possible. It should do so here. The Operating Agreement provides a mechanism for resolving disputes between the parties.<sup>10</sup> M&E and Union County are available to meet to resolve those concerns. But the Five Municipalities have neglected to use that process. The Board should direct them to do so instead of using the administrative process for a case not within the Board's jurisdiction.

---

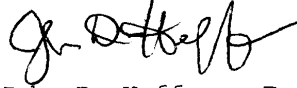
<sup>10</sup> The Operating Agreement states "[w]ithin thirty (30) days of the execution of this Agreement, the County and the M&E agree to establish a timetable for public outreach to the communities along the segments of the Lines identified in Phases II, III, and IV. The purpose of this plan is to maximize the benefits of this project to the County and the communities along the Lines. The M&E agrees not to proceed with the rehabilitation until it receives the written concurrence of the County."



V.  
CONCLUSION

Accordingly, the Five Municipalities have not established any basis for their reopening request. The Board should reject their Petition to Reopen and deny imposition of the requested environmental relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", written in a cursive style.

John D. Heffner, Esq.

Due: January 22, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of January 2004, the foregoing Reply to Petition to Reopen of Union County, New Jersey was hand delivered, to the following:

Scott N. Stone  
Patton Boggs, LLP  
2550 M Street, NW  
Washington, DC 20037

John K. Fiorella, Esq.  
Watson, Stevens, Fiorella & Rutter, LLP  
390 George Street  
P.O. Box 1185  
New Brunswick, NJ 08903  
(Counsel for Morristown & Erie Railway, Inc.)

Jonathan Broder, Esq.  
Consolidated Rail Corporation  
Two Commerce Square  
2001 Market Street - 16<sup>th</sup> Floor  
Philadelphia, PA 19103

Kraig M. Dowd, Esq.  
Brownstein, Booth & Associates, PC  
512 42<sup>nd</sup> Street  
Union City, New Jersey 07087  
(Counsel for Union County)

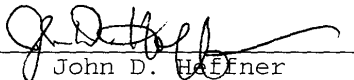
  
John D. Haffner

EXHIBIT A

NJ ST 27:1B-3  
N.J.S.A. 27:1B-3

Page 1

**C**  
NEW JERSEY STATUTES ANNOTATED  
TITLE 27. HIGHWAYS  
SUBTITLE 1A. DEPARTMENT OF TRANSPORTATION  
CHAPTER 1B. NEW JERSEY TRANSPORTATION TRUST FUND  
27:1B-3. Definitions

The following words or terms as used in this act shall have the following meaning, unless a different meaning clearly appears from the context:

- a. "Act" means this New Jersey Transportation Trust Fund Authority Act of 1984. [FN1]
- b. "Authority" means the New Jersey Transportation Trust Fund Authority created by section 4 of this act. [FN2]
- c. "Bonds" means bonds issued by the authority pursuant to the act.
- d. "Commissioner" means the Commissioner of Transportation.
- e. "Department" means the Department of Transportation.
- f. "Federal aid highway" means any highway within the State in connection with which the State receives payment or reimbursement from the federal government under the terms of Title 23, United States Code [FN3] or any amendment, successor, or replacement thereof, for the purposes contained in the act.
- g. "Federal government" means the United States of America, and any officer, department, board, commission, bureau, division, corporation, agency or instrumentality thereof.
- h. "South Jersey Transportation Authority" means the public corporation created by section 4 of P.L.1991, c. 252 (C.27:25A-4) or its successor.
- i. "New Jersey Highway Authority" means the public corporation created by section 4 of P.L.1952, c. 16 (C.27:12B-4) or its successor.
- j. "New Jersey Turnpike Authority" means the public corporation created by section 1 of P.L.1948, c. 454 (C.27:23-

NJ ST 27:1B-3  
N.J.S.A. 27:1B-3

Page 2

3) or its successor.

k. "Notes" means the notes issued by the authority pursuant to the act.

l. "Public highways" means public roads, streets, expressways, freeways, parkways, motorways and boulevards, including bridges, tunnels, overpasses, underpasses, interchanges, rest areas, express bus roadways, bus pullouts and turnarounds, park-ride facilities, traffic circles, grade separations, traffic control devices, the elimination or improvement of crossings of railroads and highways, whether at grade or not at grade, bicycle and pedestrian pathways and pedestrian and bicycle bridges traversing public highways and any facilities, equipment, property, rights of way, easements and interests therein needed for the construction, improvement and maintenance of highways.

m. "Public transportation project" means, in connection with public transportation service, passenger stations, shelters and terminals, automobile parking facilities, ferries and ferry facilities, including capital projects for ferry terminals, approach roadways, pedestrian accommodations, parking, docks, and other necessary land-side improvements, ramps, track connections, signal systems, power systems, information and communication systems, roadbeds, transit lanes or rights of way, equipment storage, pedestrian walkways and bridges connecting to passenger stations and servicing facilities, bridges, grade crossings, rail cars, locomotives, motorbuses and other motor vehicles, maintenance and garage facilities, revenue handling equipment and any other equipment, facility or property useful for or related to the provision of public transportation service.

n. "State agency" means any officers, department, board, commission, bureau, division, agency or instrumentality of the State.

o. "Toll road authorities" means and includes the New Jersey Turnpike Authority, the New Jersey Highway Authority and the South Jersey Transportation Authority.

p. "Transportation project" means, in addition to public highways and public transportation projects, any equipment, facility or property useful or related to the provision of any ground, waterborne or air transportation for the movement of people and goods including rail freight infrastructure.

q. "Transportation system" means public highways, public transportation projects, other transportation projects, and all other surface, airborne and waterborne methods of transportation for the movement of people and goods.

r. "Permitted maintenance" means, in relation to public transportation projects, direct costs of work necessary for preserving or maintaining the useful life of public transportation projects, provided the work performed is associated with the acquisition, installation and rehabilitation of components which are not included in the normal operating maintenance of equipment and facilities or replaced on a scheduled basis. The work shall ensure the useful life of the project for not less than five years and shall not include routine maintenance or inspection of equipment and facilities that is conducted on a scheduled basis. This definition shall not apply to the term "maintenance" as used

EXHIBIT B

settled on a quarterly basis, ending March 31, June 30, September 30, and December 31, respectively, with payment due within 30 days after the quarter ends. The County shall place the funds it receives from the M&E and any other revenue relating to the railroad to which it is entitled in a dedicated interest-bearing account (hereafter "the Railroad Account"), which shall be the property of the County. The funds placed in this account will be used exclusively by the County for the purposes of funding any railroad rehabilitation or other work relating exclusively to the Line, as it may be expanded, including grade crossings and any other economic development projects mutually deemed appropriate. M&E may not bill expenses against this account without prior written approval of the County.

Should any form of passenger service be initiated over the Railroad, the parties will negotiate an agreement covering the arrangements for how service should be provided and the respective rights and liabilities of the parties. In the event that the Line is abandoned, any funds remaining in the Railroad Account shall remain the property of the County.

4. OPERATION OF THE STATEN ISLAND AND RAHWAY VALLEY RAILROADS

A. *Business and Operating Plan*

M&E shall prepare a Business and Operating Plan that will outline and specify the manner in which M&E will conduct the operation of the Staten Island and Rahway Valley Railroads. The Business and Operating Plan will be written in sufficient detail that it will give a clear illustration of M&E's proposed objectives and procedures, and at a minimum will include the following sections for the operating entity:

- 1) Corporate structure including relationship to corporate parent or affiliates;
- 2) Capitalization;
- 3) Marketing plan;
- 4) Operating plan;
- 5) Safety and emergency management plan;
- 6) Maintenance plan;
- 7) Landscape plan;
- 8) Capital spending plan; and
- 9) An Interim Service Plan for Bayway Refining Company's needs.

Further, the Business and Operating Plan must not contain any provisions that conflict with existing County Legislation or Policy. This Business and Operating Plan will be developed in concert with the County.

**B. Rail Service**

For the term of this Agreement the County grants M&E the exclusive right to provide local railroad service as a common carrier on the Staten Island and Rahway Valley Railroads. M&E shall implement the restoration of railroad freight service on the aforementioned rail lines in the following four (4) phases:

PHASE I - M&E shall rehabilitate and restore to regular operation The Staten Island Railroad from MP 4.7 immediately west of the NJ Turnpike in Linden to MP 2.3 immediately east of St. Georges Avenue in Linden.

PHASE II - M&E shall rehabilitate and restore to regular operation The Staten Island Railroad from MP 2.3 immediately east of St. Georges Avenue in Linden to MP 0 at the junction of the Staten Island Railroad and the NJ Transit *Raritan Valley Line* in Cranford, exclusive of the portion of the line immediately west of MP 2.3 to MP .58 at the municipal boundary of the Borough of Roselle and the Township of Cranford. This portion of the rail line shall be rehabilitated only upon the mutual consent of the parties to this Agreement, who will continue to develop an appropriate timeline for such rehabilitation.

PHASE III - M&E shall rehabilitate and restore to regular operation The Rahway Valley Main Line from MP 0 at the junction with the NJ Transit *Raritan Valley Line* in Cranford to MP 3.9 immediately southeast of the Rahway River Bridge in Union, inclusive of the branch line from the junction at MP 3.1 and extending northeast approximately 1.1 miles, and the branch line from the junction at MP 1.1 and extending southeast approximately .50 miles.

PHASE IV - M&E shall rehabilitate and restore to regular operation The Rahway Valley Main Line from MP 3.9 immediately southeast of the Rahway River Bridge in Union to MP 7.1 at the junction of the Rahway Valley Line and the NJ Transit *Morris and Essex Line* in Summit.



M&E shall complete all rehabilitation of the Lines specified in Phases I & II, excepting the limitation specified in Phase II, and be ready to initiate rail services over this segment within 6 months of the execution of this Agreement. Within thirty (30) days of the execution of this Agreement, the County and the M&E agree to establish a timetable for public outreach to the communities along the segments of the Lines identified in Phases III & IV. The purpose of this outreach is to establish a dialogue with the affected communities and develop the most efficient plan to maximize the benefits of this project to the County and the communities along the Lines. The M&E agrees not to proceed with the rehabilitation and commencement of rail services specified in Phase III until it receives the written concurrence of the County. Upon receiving the written concurrence of the County, the M&E shall proceed with the rehabilitation specified in Phase III and be ready to initiate rail services over this segment of the Lines within 9 months of receiving this concurrence. Phase IV of this project shall be rehabilitated only upon the mutual consent of the parties to this Agreement, who will continue to develop an appropriate timeline for such rehabilitation.

Prior to commencing regular common carrier service on the Premises, M&E shall seek federal Surface Transportation Board ("STB") approval by means of a Modified Certificate of Public Convenience and Necessity and shall comply with the applicable regulations of the Federal Railroad Administration at 49 CFR Part 213.5(c) regarding its assumption of track maintenance obligations from the County. M&E further agrees to furnish the County with a draft of its Application for a Modified Certificate of Public Convenience and Necessity and any other required STB filings prior to their submission. M&E shall apply for the Modified Certificate of Public Convenience and Necessity within thirty (30) days of the execution of this Agreement. The M&E shall make every effort to facilitate obtaining this Certificate within six (6) months of the date of filing, but will not be responsible for any delay by the STB beyond M&E's control.

C. *Marketing*

M&E agrees that it shall during the term of this Agreement, and without limitation, promote, advertise, and market the availability of its services to any or all anticipated or potential rail freight service customers. M&E further agrees to provide the County with advance notice of such customer meetings and shall afford the County the opportunity to participate in these

EXHIBIT C

## RESOLUTION NO.

**DATE:**

902-02

The Efficiency of Funds  
 James M. Board  
 8/23/02

RECORD OF VOTE															
FREEHOLDER	Aye	Nay	Abs	Pass	Res.	Sec	NP	FREEHOLDER	Aye	Nay	Abs	Pass	Res.	Sec	NP

RECORD OF VOTE															
FREEHOLDER	Aye	Nay	Abs	Pass	Res.	Sec	NP	FREEHOLDER	Aye	Nay	Abs	Pass	Res.	Sec	NP
ESTRADA	X					X		SCUTARI	X						
HOLMES	X							SULLIVAN							X
MIRABELLA							X	RUOTOLO	X				X		
PROCTOR	X							VICE-CHAIRMAN	X						
SCANLON	X							MINGO	X						
								CHAIRMAN							

APPROVED AS TO FORM  
Sharda Basili  
 COUNTY ATTORNEY

I hereby certify the above to be a true copy of a resolution adopted by the Board of Chosen Freeholders of the County of Union on the date above mentioned.  
Sharda Basili

EXHIBIT D

EXHIBIT D

**AFFIDAVIT OF JAMES DALEY**

James Daley, being duly sworn, deposes and states as follows:

1. My name is James Daley. My business address is County of Union, Administration Building, Elizabethtown Plaza, Elizabeth, NJ 07207. I have been employed by the County of Union for approximately five and one half years. I currently serve as Director, Department of Economic Development for Union County. My responsibilities in that capacity include overseeing the development and implementation of a comprehensive economic development plan for the county. Under my jurisdiction are land use planning, transportation planning, housing, and community development efforts. As pertinent here, I am the county official with overall responsibility for the rehabilitation and restoration to rail service of the former Staten Island Railway and Rahway Valley Railroad lines, which are the subject of this proceeding before the Surface Transportation Board and have been the subject of litigation in the New Jersey Courts.
2. The Five Municipalities allege in their Petition to Reject before the Board and alleged in the New Jersey litigation that Union County reneged on a contractual promise to the communities served by the subject rail lines. Specifically, the Five Municipalities submit as the basis for their litigation a series of correspondence and other documents between the County or

County officials and officials with the Five Municipalities indicating that obtaining consent of the Five Municipalities was a prerequisite to the resurrection of rail service over the subject lines. This is not the case.

3. The Operating Agreement signed by Union County and the Morristown & Erie Railway ("M&E") divides the railroad into four segments, with service to be restored in four phases. While service on the first segment is to be restored immediately, service on the other segments is to be restored, depending upon the segment, either with the consent of the County or the mutual consent of both parties. Furthermore, the Agreement establishes a community outreach process to develop an ongoing dialog with the on-line communities.
4. My purpose in submitting this Affidavit is to set the record straight. At the time County Manager Devanney wrote his August 5, 2002, letter he erroneously interpreted the Operating Agreement as giving the on-line communities a veto over the resurrection of rail service. He and several others made that interpretation without seeking guidance from Union County's legal counsel. During the subsequent months, Union County eventually obtained the advice of counsel as well as M&E's views that the restoration of rail service did not require consent from those communities. The Five Municipalities are not now and have never been parties to the Operating Agreement.
5. Accordingly, in order to resolve this confusion, the Union County Board of Chosen Freeholders scheduled a meeting for 7PM on June 5, 2003, to

discuss this matter in an open forum. Members of the public including representatives of the Five Municipalities participated in what termed out to be a heated and spirited discussion resulting in the Resolution No. 633-20, resolving this matter. The resolution adopted by the Board authorized the M&E to complete the reconstruction and re-establishment of rail service in phases II, III, and IV.



VERIFICATION

STATE OF NEW JERSEY   )  
                                  )   SS  
COUNTY OF UNION       )

James Daley, being duly sworn according to law, hereby deposes and states that (s)he is authorized to make the Verification, has read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of (her)his knowledge, information and belief.

James Daley

Subscribed and sworn to before me, a Notary Public, in and for the County of Union in the State of New Jersey, this 22<sup>nd</sup> day of January 2004.

Cheryl A. Pantina  
Notary Public

My Commission Expires:

May 16, 2008

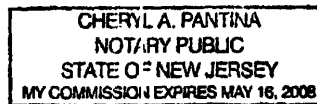


EXHIBIT E

**FILED**

DEC 15 2003

EDWARD W. BEGLIN, JR.  
A.J.S.C.

**BROWNSTEIN BOOTH & ASSOCIATES, P.C.**  
**512 42<sup>nd</sup> Street**  
**Union City, New Jersey 07087**  
**(201) 866-4949**  
**Attorneys for Defendant, County of Union**

**THE BOROUGH OF KENILWORTH,**  
**JOHN DOE and JANE DOE 1-5, ABC**  
**CORPORATION 1-5 and OTHERS**  
**SIMILARLY SITUATED,**

Plaintiffs,

vs.

**THE COUNTY OF UNION AND THE**  
**MORRISTOWN AND ERIE RAILWAY,**  
**INC., A NEW JERSEY CORPORATION,**

Defendants.

**SUPERIOR COURT OF NEW JERSEY**  
**LAW DIVISION: UNION COUNTY**  
**DOCKET NO.: UNN-L-2302-03**

Civil Action

ORDER

THIS MATTER having been presented to this Court by way of Motion to Dismiss Plaintiffs' Complaints, as amended, for failure to state a claim or, in the alternative, for a more definite pleading from Plaintiff, on behalf of Defendant, County of Union by Brownstein Booth & Associates, P.C., on notice to Harvey Fruchter, Esq., attorney for Plaintiff, Borough of Kenilworth; Vincent K. Loughlin, Esq., attorney for Plaintiff, Borough of Roselle Park; Bruce H. Bergen, Esq., attorney for Plaintiff, Township of Springfield; John De Massi, Esq., attorney for Plaintiff, Borough of Roselle and Barry A. Osmun, Esq., attorney for Plaintiff, City of Summit; John K. Fiorilla, Esq., attorney for Defendant, Morristown & Erie Railway, Inc., and the Court having considered the papers submitted and the oral arguments made by counsel, and good cause having been shown for the entry of this Order.

IT IS on this 16<sup>th</sup> day of December 2003.

ORDERED as follows:

1. Defendant, Morristown and Erie Railway, Inc.'s Motion to Dismiss Plaintiffs' Amended Complaints for failure to state a claim upon which relief may be granted is hereby granted in its entirety and Plaintiffs' Complaints, as amended are hereby dismissed as against the Defendant, Morristown and Erie Railway, Inc. with prejudice:
- and


2. Defendant County of Union's Motion to Dismiss Plaintiffs' Amended Complaints for failure to state a claim upon which relief may be granted is hereby granted as to all counts contained within each of the Plaintiffs Amended Complaints except that the following counts shall remain:

Borough of Roselle Park:	Count Three (3) and Count Seven (7)
Borough of Roselle:	Count Three (3)
Borough of Kenilworth:	Count Ten (10) and Count Seven (7)
City of Summit:	Count Four (4) and Count Eight (8)
Township of Springfield:	at paragraphs two (2) and (3), inasmuch as they incorporate Counts Three (3) and Ten (10), respectively, of the Borough of Roselle Park's and Borough of Kenilworth's Amended Complaints.

3. Defendant County of Union shall file an Answer to the above listed remaining Counts by no later than December 20, 2003.

4. All Discovery in this matter shall be completed by no later than January 4, 2004.

5. A copy of this Order shall be served upon counsel for all parties within 5 days of the date of this Order.

  
EDWARD W. BEGLIN, R.A.J.S.C.  
A.J.S.C.

R: 1:6-2(a): The within matter was XXX opposed \_\_\_\_\_ unopposed.

R: 1:6-2(f): ✓ The Court made (✓ oral \_\_\_\_\_ written) findings of fact and conclusions of law explaining its disposition of this matter on December 5<sup>th</sup>, 2003.

\_\_\_\_ If no such findings have been made by the Court, appended hereto is a statement of reasons for the disposition of this matter on \_\_\_\_\_, 2003.

\_\_\_\_ The Court concludes that explanation is not necessary or appropriate.